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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 169

DIATOMITE CORPORATION OF AMERICA,

Petitioner,

-vs-

LEHIGH PORTLAND CEMENT CO.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE SUPREME COURT OF THE UNITED STATES

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LEHIGH PORTLAND CEMENT CO.,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MOTION FOR LEAVE TO FILE PETITION FOR CERTIORARI

Pursuant to Rule 31 of the Rules of the United States Supreme Court the petitioner, DIATOMITE CORPORATION OF AMERICA, moves this Honorable Court for leave to file this petition for certiorari to the United States Court of Appeals for the Fifth Circuit.

The petitioner, DIATOMITE CORPORATION OF AMERICA, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered April 1, 1959 (and adhered to by order entered April 29, 1959, denying timely petition for rehearing), affirming the decree of the United States District Court for the Southern District of Florida, Miami Division, which dismissed the complaint filed by DIATOMITE CORPORATION OF AMERICA against the LEHIGH PORTLAND CEMENT CO.

CITATIONS TO OPINIONS BELOW

The unreported Order of the United States District Court for the Southern District of Florida, Miami Division, dismissing the complaint with prejudice appears on page 32 of the record printed for the use of the Court below and filed with this petition. The opinion of the Court of Appeals for the Fifth Circuit, affirming the Order of the District Court, is printed in Appendix A hereto, page A.1-A.3, and is reported in 265 F.2d 444. The unreported judgment of the Court of Appeals is printed in Appendix B hereto, page A.3-A.4. The unreported Order of the Court of Appeals denying the petition for rehearing is printed in Appendix C hereto, page A.4.

GROUNDS ON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

The jurisdiction of the Court is invoked on the ground that the United States Court of Appeals, Fifth Circuit, has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision.

The Court of Appeals for the Fifth Circuit has rendered a decision in conflict with a decision of the Court of Appeals for the Second Circuit on the same matter.

(i) The date of judgment sought to be reviewed is April 1, 1959, and its entry was on April 1, 1959. (App. p. A.3-A.4)

(ii) The Order denying a petition for rehearing was entered on April 29, 1959. (App. p. A.4)

(iii) The United States Supreme Court has jurisdiction to review the said judgment and opinion under 28 U.S.C.A. §1651(a) and 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED

I.

DID THE UNITED STATES COURT OF APPEALS FAIL TO TAKE COGNIZANCE OF FACTS PATENT ON THE FACE OF THE RECORD AND FAIL TO APPLY LEGAL PRINCIPLES GOVERNING THE CONSTRUCTION OR INTERPRETATION OF WRITTEN CONTRACTS?

II.

DID THE UNITED STATES COURT OF APPEALS AND THE COURT OF FIRST INSTANCE DEPART FROM THE JUDICIAL NORM AS EXPRESSED IN RULE 15(a) OF THE FEDERAL RULES OF CIVIL PROCE-

DURE AND THE FEDERAL OPINIONS INTERPRETING AND APPLYING THE RULE?

STATEMENT OF THE CASE

Basis for Federal Jurisdiction in the Court of first instance was diversity of citizenship and an amount in controversy exceeding Three Thousand ($3,000.00) Dollars exclusive of costs and interest.

On or about the early part of February 1955, Harold G. Aron was approached by John C. Shumberger, Jr., an agent and director of properties of the respondent LEHIGH PORTLAND CEMENT CO. Shumberger and other agents of the respondent represented to Aron, who at that time was acting on behalf of Ormond Plantations, Inc., as its duly authorized agent, with the knowledge and intent that such representations would be believed and relied upon, that the respondent was interested in buying certain properties (legal description of which appears in Exhibit "D", (R. 25-26) owned by Ormond Plantations, Inc., for the purpose of extracting therefrom coquina rock and shell to be used in the respondent's business. Further represented that it had no interest whatsoever in developing any portion of the said properties for any other use and that they were prepared and willing to resell to Ormond Plantations, Inc., any portion of such properties which geological engineering reports and surveys might subsequently determine did not contain commercially minable deposits of coquina rock and shell.

In recognition of the respondent's representations, a clause was inserted in the proposed option contract, Exhibit "B", (R. 20). Originally, this clause was to read,

"It is understood that there is a possibility that the optionee and/or purchaser of the property will not desire title to all the land involved in the tract herein described and the said optionee and/or purchaser does give Mr. Harold Aron and/or his assignees the rights and privileges to repurchase any portion of the land herein described that they do not desire to retain at the price of $100.00 per acre." This wording was unacceptable to Aron and with the respondent's permission and concurrence the word "desire" as used in the first sentence was stricken and the word "require" was substituted. Thereafter the option contract was signed by Aron on behalf of Ormond Plantations, Inc. This was a standard mining option contract with a provision granting the right to go on the land to drill and prospect for stone, with provision for the protection against damages to growing crops, and providing for method of compensation in the eventuality that damage did occur. The other provisions provided for the time in which the option was to be exercised by the respondent and the terms and time limitation of the aforementioned repurchase option reserved by the petitioner. On March 10, 1955, within the specified time limit of the option contract, the respondent through its agent, John C. Shumberger, Jr., exercised its option by a letter to Ormond Plantations, Inc. Exhibit "C", (R. 24), and a deed was executed by Aron, Exhibit "D", (R. 25-27). Aron wrote a series of letters to Robert E. Curtan, agent of respondent, inquiring as to acreage that would not be required for mining purposes. These letters were written beginning December, 1955 through August, 1956 (R. 6).

Thereafter Mr. Aron, acting on behalf of Ormond Plantations, Inc., in a letter to Mr. Shumberger on August 15, 1956 Exhibit "E", (R. 29), requested that the re-

spondent furnish notice of what land did not contain sufficient quantities of coquina rock and shell to make the mining of them economically feasible so that Ormond Plantations, Inc. could exercise its repurchase option. On August 31, 1956, John C. Shumberger, Jr. wrote a letter to Mr. Aron in which he stated that LEHIGH PORTLAND CEMENT CO. "desires and requires" to retain all of the land that it had purchased (R. 30). On March 24, 1958, DIATOMITE CORPORATION OF AMERICA, the assignee of Ormond Plantations, Inc. and Harold G. Aron, filed a complaint for declaratory judgment and alternative relief in the United States District Court for the Southern District of Florida, Miami Division, and on the 7th of May, 1958, the Court entered an Order granting the respondent's motion to dismiss with prejudice (R. 32).

ARGUMENTS FOR REASON RELIED ON FOR ALLOWANCE OF THE WRIT

The United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower Court, as to call for an exercise of the power of supervision by the United States Supreme Court. The Court of Appeals for the Fifth Circuit has rendered a decision in conflict with a decision of the Court of Appeals for the Second Circuit on the same matter.

The petitioner is being deprived of its contractual right to repurchase land of great and substantial value located in Volusia County, Florida. The Court of Appeals, in affirming the judgment of the court of first instance, as it appears to this petitioner from the opinion of the Court of Appeals (R. 38-40), followed the line of least

resistance and adopted the unsupported argument of the respondent to the effect that the contract in question was an unambiguous contract and that parol evidence was inadmissible to vary its terms.

The Court thereby failed to take cognizance of the only issues which were raised and presented in that court. The appellee in the Court of Appeals, in its brief and argument, failed and refused to meet, reply to and argue the issues raised by the petitioner in the United States Court of Appeals.

The crux of the controversy involved in this litigation is the effect to be given to the fact that the parties to the subject contract deleted therein the word "desire" where it first appeared within the contract and substituted therefor the word "require."

The word "desire" appeared subsequently in several other parts of the contract. Substitution did not occur where it subsequently appeared.

In construing a contract, such as herein involved, the Court should adhere to and apply the basic principle that in the construction of a contract the intention of the parties thereto, if possible, will be ascertained from a consideration of the whole contract. **City of Orlando v. Murphy** (5th Cir., 1936), 84 F.2d 531; **Stewart v. Preston** (1846), 1 Fla. 10, 44 Am. Dec. 621; **Triple E. Development Co. v. Florida Gold Citrus Corp.** (Fla. 1951), 51 So.2d 435; 7 Fla. Jur., Contracts, §77; 12 Am. Jur., Contracts, §241.

The contract involved was a mineral contract, with an option, providing for exploration, the sale and recon-

veyance of certain lands. The Court of Appeals, to the contrary, found that the contract was nothing more than an option contract, saving to the seller the right of repurchase (App. p. A.3). This clearly appears from that portion of the opinion which follows:

> "****It simply meant that if, because it did not require part of the property it should desire to resell that part, it must first give the right of repurchase to the original owner. It did not mean that upon a failure of Lehigh to require it all for the specific purpose of mining coquina rock or for any purpose then it was compelled to resell it regardless of its desire to do so." (R. 40)

Further, it has been the consistent contention of the petitioner that the contract in question, properly construed, is an unambiguous contract and that the text and content thereof as alleged in the complaint in the court of first instance are specific and clear or essential facts may be clearly inferred therefrom. In support of that position, the petitioner states that the provisions of the contract provide, in substance, for the sale and purchase of a certain tract of land at a stipulated price per acre. It is further provided therein that during an option period the purchaser might go upon the land for the purpose of drilling and prospecting for stone; that the purchase of the tract was to be without the benefit of survey to ascertain the specific acreage therein; and that the land not required by the purchaser would be reconveyed to the seller. There was a further provision in the contract wherein the seller warranted that there were no restrictions in the title on the mineral rights or mining rights of the property.

How could it be clearer from the foregoing that the intent of the parties was that the seller would convey an unsurveyed tract of land, giving to the purchaser the right to go thereon, during an option period, for the purpose of doing geological tests and surveys to determine whether there was adequate or sufficient stone underlying the land to make the purchase thereof profitable to the operation of the respondent's cement business? It was equally as clear that the portion of the tract, where there was not sufficient minable stone, would be reconveyed to the seller at the identical price for which it was purchased.

It is common knowledge that a transaction involving the purchase of acreage carries with it a requirement of survey. Especially is that true where the purchaser is buying the acreage at a stipulated price per acre—thus providing the basis to which the unit price is applied to derive the purchase price. The objective was exactly the same in the subject case, but was to be accomplished by subsequent geological surveys, as distinguished from the normal and initial metes and bounds survey. From the geological survey it was to be determined what acreage contained sufficient coquina stone to make mining thereof profitable to the business of the respondent—thus required in its business. From the contract, properly construed, it was clear that the acreage not possessing sufficient stone was to be reconveyed.

From a provision of the contract it is clear that the seller represented that there were 2900 acres in the tract for which the purchaser or respondent was to pay $100.00 per acre. It can safely be stated that a substantial business concern such as LEHIGH PORTLAND CEMENT

CO. would not pay $100.00 per acre for 2900 acres unless it were first established that there were that many acres within the tract to be purchased unless there was some other provision or arrangement under which LEHIGH would be protected. The evidence of the protection in this case arises from the fact and expression in the contract that there was to be a reconveyance to the seller—petitioner of all of the 2900 acres less that number of acres which were determined from geological survey to possess sufficient stone to make mining thereof profitable to LEHIGH. For the acreage reconveyed LEHIGH or the respondent herein was to be paid per acre the exact consideration that it had initially paid for the property. The result makes it quite obvious that the initial survey was not at all important or necessary and the manner in which this transaction was consummated can leave no doubt but that it was the intent of the parties that LEHIGH was to reconvey all acres from the tract that could not be profitably mined.

That is exactly all that the petitioner has been attempting to accomplish in the court of first instance and the Court of Appeals. The intent of the parties to that effect being so clear from the foregoing that it would be a denial of its constitutional rights to deprive it of the property.

In conjunction with the foregoing, it is important to consider the warranty in the subject contract to the effect that there was no restriction on the mineral or mining rights to the property. These things clearly add up to the fact that the respondent only wanted that part of the land which could be profitably mined.

Had there not been a substitution in the contract of the word "require" for the word "desire", there would have been no controversy. Therefore, consideration must be given to the fact that there was a substitution and the proper rules of construction and interpretation of a contract must be applied for the Court to determine what the real intent of the parties was to this contract.

It is a well settled rule of law that where part of a contract is written and part printed and the written and printed parts are inconsistent, or apparently inconsistent, or if there is reasonable doubt as to the sense and meaning of the whole, the word in writing will control. **Pacific Rice Mills v. Westfeldt Bros.** (5th Cir., 1929), 31 F.2d 979; **Burdines, Inc. v. Pan-Atlantic S. S. Corp.** (5th Cir. 1952), 199 F.2d 571; 7 Fla. Jur., Contracts, §253.

No one will deny that the meanings of the word "require" and "desire" are discordant. Likewise, no one will deny that a decision left to "desire" is one to be based upon whim and caprice whereas, a decision based upon "require" necessitates the application of a standard.

In this case and for the very reason that a substitution of the words occurred, it is quite clear that the original owner and seller of the property was not content to leave the decision of reconveyance to the whim and caprice of the respondent. By applying everyday, ordinary, common sense, it follows that the seller refused to accept the original form of the contract. Substitution of "require" for "desire" was demanded to bind the respondent to the obligation of reconveyance of acreage not "required" for profitable operations of respondent's cement business. Parties having agreed upon the substitution of

"require" for "desire", words of such discordant meaning, it would be utterly untenable to contend that it was not meant that the substitution should not apply at all subsequent points in the contract where the word "desire" appeared and where used in the same sense as it was in all subsequent places in this contract. It is equally as untenable to contend that the words "require" and "desire", as used in this contract were intended to be interchanged or synonymous.

In contract litigation, controversy arising out of the use of the words "desire" and "require" is far from rare. There are innumerable opinions judicially determining and settling such controversies. See **Coe et al. v. Aiken et al.** (Cir. Ct. D., N.H. 1893), 61 Fed. 24; **Tracy & Company v. Elizabethtown, Lexington and Big Sandy R. R. Company** (1882), 80 Ky. 259; **Boyce et al. v. Stringfellow et al.** (1908), 52 Tex. Civ. App. 504, 114 S.W. 652; **Albany Power and Manufacturing Company v. The City of Albany** (1909), 133 Ga. 375, 65 S.E. 886; **Ex parte Kohler** (Cal. 1887), 15 Pac. 436.

It has been the alternate position of the petitioner, assuming en arguendo, that a standard for the respondent's right to require does not appear from the four corners of the contract, parol evidence is properly admissible to establish the standard intended by the parties.

If the standard or meaning of the word "require" is not evident from the face of the contract, the contract at the very least is ambiguous and is susceptible to being clarified and defined by way of parol evidence. See **W. H. Purcell Co. v. Sage** (Ill. 1902), 65 N.E. 723; **McLean County Coal Co. v. City of Bloomington** (1908), 234 Ill. 90, 84 N.E. 624.

At the very least, the instant contract is ambiguous. Parol evidence should be admissible to establish the meaning of the contract and the agreement of the parties. The court of first instance in dismissing the complaint for failure to state a cause of action erred in adopting an interpretation of the respondent contrary to the meaning of an unambiguous contract. In the alternative, the Court erred in denying the petitioner the opportunity of introducing evidence concerning the meaning of the contract which at the very least is ambiguous in reference to divergent interpretations placed upon it by the parties.

The Court of Appeals, by affirming the court of first instance and failing to recognize and apply all of the authorities above cited, thereby so far departed from the accepted and usual course of judicial proceeding, and so far sanctioned such a departure by a lower court as to call for the exercise of the power of supervision by the Supreme Court of the United States. Particularly, is this evident from the following finding of the Court of Appeals:

> " ****Lehigh, the appellee, was engaged in the manufacture of cement from certain rock formations which existed under parts of the tract of land. It did not notify appellant of its desire to resell any of the land, but notified it that it "desires and requires" to retain all of the land purchased." (R. 39)

The Court of Appeals acquired the expression "desires and requires" from Exhibit "F" attached to the bill of complaint which appears on page 30 of the printed record filed with this petition. It might be observed that

in the said Exhibit "F" the respondent became aware of the discordant meaning of the words and tried to cover by using the words in the written exhibit as if they were synonymous. If the parties had intended the words to be synonymous it was a futile and ridiculous act to effect the substitution in the contract. That the Appellate Court treated the words as interchangeable and synonymous, is obvious from the following portion of its opinion:

> "The option contract was plain and unambiguous on its face. It gave to the purchaser the right to retain all the land except that which it might "desire" to resell. The fact that it stated that it might not need (require) all the property did not change the meaning of the word "desire" to "require." It simply meant that if, because it did not require part of the property it should desire to resell that part, it must first give the right of repurchase to the original owner. It did not mean that upon a failure of Lehigh to require it all for the specific purpose of mining coquina rock or for any purpose then it was compelled to resell it regardless of its desire to do so." (R. 40)

QUESTION II.

The Court further departed from the accepted and usual course of judicial proceeding when it affirmed the dismissal of the petitioner's complaint in the court of first instance when the petitioner had been deprived of his right to amend the complaint with reference to a claim sounding in fraud and deceit, growing out of representations made to the petitioner by the respondent at the time the subject contract was entered into.

This subject was raised as a question in the Court of Appeals in the brief filed in that Court by the petitioner. The appellee in that court (respondent herein) in its brief ignored and failed to reply to the question. Likewise, the Court of Appeals in its opinion (R. 38), failed to mention or dispose of the question.

It was contended in the Court of Appeals that a reading of the entire complaint made it obvious that an attempt was made to state a cause of action for fraud, that all of the necessary elements were expressly stated or could be inferred.

It is now universally held under modern rules of civil procedure that leave to amend should be freely given when justice so requires. Rule 15(a), Federal Rules of Civil Procedure, e.g., **Hirshorn v. Mine Safety Appliances Co.** (D.C. Pa. 1951), 101 F.Supp. 549, affirmed 193 F.2d 489, C.A.A. 2nd Cir. 1952; **Snyder v. Dravo Corp.** (D.C. Pa. 1947), 6 F.R.D. 546.

CONCLUSION

We have presented questions which we believe are encompassed by Rule 19(b) of this Court. We believe it to be of importance, not only in this cause, but of substantial importance to the future proceedings in the Federal Courts.

It is respectfully submitted that this petition for certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

WALTER HUMKEY
Attorney for Petitioner
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Miami 32, Florida

CERTIFICATE OF SERVICE

The undersigned, WALTER HUMKEY, one of the Attorneys for the petitioner in the above and foregoing Petition for Writ of Certiorari, does hereby certify that a copy of said petition was served by United States mail under Rule 33 of the Rules of the United States Supreme Court on the 29th day of June, 1959, by depositing a copy thereof in a United States Mail Box with first-class postage prepaid, addressed to MARSHALL S. SCOTT, 627 Ingraham Building, Miami 32, Florida, the counsel of record for the respondent.

Walter Humkey

WALTER HUMKEY

APPENDIX A

OPINION OF THE COURT FILED: April 1, 1959.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17422

DIATOMITE CORPORATION OF AMERICA,

Appellant,

versus

LEHIGH PORTLAND CEMENT CO.,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 1, 1959.)

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

PER CURIAM: Appellant assignor owned and sold to appellee 2901 acres of land in Volusia County, Florida, following the latter's acceptance of an option which provided that purchaser might not **require** title to all the land, and it gave to the seller an option to repurchase at $100 an acre any part which it did not **desire** to retain.[1] Lehigh, the appellee, was engaged in the manufacture of cement from certain rock formations which existed under parts of the tract of land. It did not notify appellant of its desire to resell any of the land, but notified it that it "desires and requires" to retain all of the land purchased.

Thereupon appellant brought suit for declaratory judgment, seeking to have the court determine that Lehigh was obligated to resell to it all the property not "required" for coquina mining and that such part consisted of lands which "do not contain commercially minable deposits of coquina rock and shell."

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1 The language of the agreement here pertinent is as follows:

"It is understood that there is a possibility that the optionee and/or purchaser of the property will not require title to all of the land involved in the tract herein described and said optionee and/or purchaser does hereby give Mr. Harold Aron, and/or his assigns, the right and privilege to purchase any portion of the land herein described that they do not desire to retain at the price of One Hundred ($100.00) Dollars per acre. This privilege shall be given by the optionee and/or purchaser to the said Mr. Harold Aron and/or his assigns by registered mail not later than the 15th day of September, A.D., 1956, c/o Louis Ossinsky, Sr., Esq., 411 Main Street, Daytona Beach, Florida, describing the property which the optionee and/or purchaser does not desire to retain and, upon receipt of said notice, said Harold Aron and/or his assigns shall exercise said option to purchase said land, as herein granted, within sixty (60) days thereafter by registered mail, addressed to the said John C. Shumberger, Jr., at 31 South Hall Street, Allentown, Pennsylvania, or at the last known Post Office address of the said optionee and/or purchaser, and said transaction shall be consummated at the office of Messrs. Horn & Ossinsky, 411 Main Street, Daytona Beach, Florida, by noon on the 15th day of December, A.D., 1956, and delivering the purchase price simultaneously with delivery of a good and sufficient warranty deed conveying said real property."

The trial court held that the complaint should be dismissed with prejudice for failure to state a cause of action, and from this order this appeal was taken.

We affirm the judgment of the trial court.

The option contract was plain and unambiguous on its face. It gave to the purchaser the right to retain all the land except that which it might "desire" to resell. The fact that it stated that it might not need (require) all the property did not change the meaning of the word "desire" to "require." It simply meant that if, because it did not require part of the property it should desire to resell that part, it must first give the right of repurchase to the original owner. It did not mean that upon a failure of Lehigh to require it all for the specific purpose of mining coquina rock or for any purpose then it was compelled to resell it regardless of its desire to do so.

The judgment is AFFIRMED.

APPENDIX B

JUDGMENT.

Extract from the Minutes of April 1, 1959.

DIATOMITE CORPORATION OF AMERICA,

No. 17422 versus

LEHIGH PORTLAND CEMENT CO.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is furthered ordered and adjudged that the appellant, Diatomite Corporation of America, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * *

APPENDIX C

ORDER DENYING REHEARING.

Extract from the Minutes of April 29, 1959.

DIATOMITE CORPORATION OF AMERICA,

No. 17422. versus

LEHIGH PORTLAND CEMENT CO.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

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